in the

Supreme Court of the United States

October Term, 1977

NO. 77-1369

MARY SANTO,

Petitioner,

vs.

FEICK SECURITY SYSTEMS
ZURICH INSURANCE COMPANY
AND THE
FLORIDA INDUSTRIAL
RELATIONS COMMISSION

Respondents.

RESPONDENT ZURICH INSURANCE COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA INDUSTRIAL RELATIONS COMMISSION

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STATEMENT OF THE CASE

Alberto Santo, deceased husband of the petitioner, was injured on December 23, 1974 in an accident in the course of his employment as a watchman for Feick Security Systems.[1] The accident occurred while Santo was carrying out his duties aboard the M.V. Gillis, a University of Miami research vessel docked in the navigable waters of Biscayne Bay. Following the death of Santo the claim was amended and is currently being brought on behalf of Santo's widow for death benefits.[2]

Respondent, Zurich Insurance Company, moved to dismiss the claim on the ground that Florida Statute, section 440.09(2)[3] precludes the payment of benefits to an employee such as Santo, covered by the Federal Longshoremen's and Harbor Workers' Compensation Act. Santo's claim lies within federal rather than state jurisdiction.

An evidentiary hearing was held before the Judge of Industrial Claims in which witnesses testified regarding the nature of Santo's work and the circumstances surrounding his accident. The undisputed facts placed Santo at the time of his accident aboard the deck of the vessel which he customarily patrolled in the line of duty.

Upon consideration of the evidence the trial judge issued an order[4] granting Zurich's motion to dismiss the claim on the ground that the state lacked jurisdiction, citing as authority *Atlas Iron and Metal Company v. Hesser,* 177 So.2d 199(Fla. 1975); *Calbeck v. Travelers Insurance Co.,* 370 U.S. 114 (1962); and *Rex Investigation and Patrol Agency v. Collura,* 329 F. Supp. 696 (E.D.N.Y. 1971).

Santo appealed the decision to the Florida Industrial Relations Commission which, after hearing oral argument, issued a brief *per curiam* order[5] finding no reversible error and therefore affirming the decision of the Industrial Claims Judge.

Santo's petition for writ of certiorari was subsequently denied by the Florida Supreme Court[6] which

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[1]Petitioner has incorrectly named Feick Security Systems as a party-respondent herein. Zurich Insurance Company, Feick's state workmen's compensation carrier, denied coverage to Feick maintaining that Santo's claim fell within the jurisdiction of the Federal Longshoremen's and Harbor Workers' Compensation Act. Feick then retained independent counsel to represent its interest in the state proceedings but failed to file a timely appeal to the Florida Industrial Relations Commission of the original order of the trial judge dismissing Santo's claim for lack of state jurisdiction.

[2]The parties agreed to bifurcate the hearing before the Judge of Industrial Claims so that only the issue of jurisdiction was litigated below. Therefore, there has been no evidence adduced regarding the extent of Santo's injuries or whether his death is causally related to the accident.

[3]F.S.§440.09 Coverage. —
(2) No compensation shall be payable in respect of the disability or death of any employee covered by the Federal Employer's Liability Act, the Longshoremen's and Harbor Workers' Compensation Act, or the Jones Act.

[4]See Petitioner's Appendix D at App. 10.

[5]See Petitioner's Appendix C at App. 7.

[6]See Petitioner's Appendix B at App. 5.

found simply that there had been "no departure from the essential requirements of law" according to the applicable standard for review of Commission orders enunciated in *Scholastic Systems, Inc. v. LeLoup*, 307 So.2d 166(Fla. 1974).

Subsequently, Santo petitioned for a rehearing by the Florida Supreme Court urging the Court to consider as controlling the recent opinion of the United States Supreme Court in *Northeast Marine Terminal Company, Inc. v. Caputo*, 432 U.S. 249(1977). The petition for rehearing was summarily denied by the Florida Supreme Court on December 28, 1977.[7]

Finding the door closed to relief in the state judicial system, Santo initiated proceedings in the federal system by filing a claim for benefits under the Federal Longshoremen's and Harbor Workers' Compensation Act. This claim is currently pending before the federal Administrative Law Judge.

REASONS FOR DENYING THE PETITION

I.

THE DECISION BELOW IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *NORTHEAST MARINE TERMINAL COMPANY, INC. V. CAPUTO*, 432 U.S. 249(1977)

Neither the 1972 amendments to the Longshoremen's and Harbor Worker's Compensation Act nor the interpretation of those amendments in

[7]See Petitioner's Appendix at App. 3.

Northeast Marine Terminal Company, Inc. v. Caputo, 432 U.S. 249(1977) relates directly to the issues in this case. In *Northeast* the Court considered whether certain dockside workers (one checking, the other unloading, cargo from a ship's container) were "employees" under the broadened coverage provided by the 1972 amendments to the federal Act. The purpose of the amendments, the Court stated, was to provide continuous coverage to these amphibious workers engaged in modern longshoring operations who, prior to the amendments, would have been covered for only part of their activity.

Santo, on the other hand, received injuries while acting as a watchman aboard a vessel afloat in navigable waters. He, therefore, was a member of a different class of worker; a class not reached for consideration by the Court in *Northeast:*

> As the definition of employee makes clear, the category of persons engaged in maritime employment includes more than longshoremen and persons engaged in longshoring operations. It is, however, unnecessary in this case to look beyond these two sub-categories.

This case also does not involve the question whether Congress excluded people who would have been covered before the amendments; that is, workers who are injured on navigable waters as previously defined. See *Weyerhaeuser Co. v. Gilmore*, 528 F. 2d 957(CA9) Cert. denied,___U.S.___(1976). *Id.* 432 U.S. at ___n. 25.

How then can petitioner claim a conflict between the decision below and that in *Northeast* when the Courts have not addressed the same issue?

Likewise, petitioner's reference to post-*Northeast* decisions allegedly in conflict with the decision below is off course. Again each of these cases deals with workers injured in the expanded situs, i.e., on an adjoining pier or terminal facility, rather than in the original situs, i.e., on navigable waters.[8]

[8]*Cargill, Inc. v. Powell,* Case No. 75-2655 (9th Cir. Nov. 17, 1977) held a worker unloading grain from railroad cars on a marine terminal was not involved in longshoring operations and therefore was not a covered employee under the federal Act.

Dravo Corp. v. Banks, Case No. 77-1433 (3rd Cir. Dec. 16, 1977) held a janitor employed at a shipbuilding facility was not a "shipbuilder" under the Act.

Stockman v. John T. Clark and Son of Boston, 539 F.2d 264 (1st Cir. 1976), held a worker engaged in "stripping" containers in a waterfront area was a "longshoreman" covered by the 1972 amendments.

This case is erroneously cited by petitioner as standing for the proposition that a security guard is not within the parameters of the federal Act. (Petitioner's Brief at 24). The case does not deal with a security guard at all. In discussing whether the union label of longshoreman should be determinative of the coverage issue under the Act, the Court mentions that a longshoreman's union may force an employer to hire its members "for such unlongshoremen-like positions as clerks or guards". *Id* at 272. However, even if a guard does not fall within the specific category of "longshoreman", he is not thereby precluded from coverage under the Act as a general employee engaged in maritime employment. As the *Stockman* Court points out,

> This is not to say that workers who are not plainly longshoremen, or otherwise plainly included in some recognized category of maritime employment, may not have to demonstrate their entitlement to coverage by showing that their duties encompass shipboard activity. *Id.* at 277.

Santo has made that showing.

II.

THE DECISION BELOW CORRECTLY INTERPRETS THE JURISDICTIONAL PROVISIONS OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AND IN NO WAY THREATENS "STATE AND FEDERAL RELATIONSHIPS"

Petitioner fails to cite a single case which excludes from coverage under the federal Act a watchman injured while patrolling a vessel in navigable waters. In fact, the federal courts have consistently granted such watchmen the benefits of the Act holding that a watchman's services are maritime in nature. See, *Hillcone S.S. Co. v. Steffen,* 136 F.2d 965(9th Cir. 1943); *Ford v. Parker,* 52 F. Supp. 98(D. Md. 1943); *Rex Investigation and Patrol Agency, Inc. v. Collura,* 329 F. Supp. 696(E.D.N.Y. 1971).

Although each of these cases was decided prior to the enactment of the 1972 amendments, the result would in no way be altered by application of the new language. The amendments have simply incorporated the original "status" term, "maritime employment" into section 902(a) requiring the employee himself, as well as his employer, to be engaged in "maritime employment."[9] Therefore, a consideration of pre-

[9]Petitioner has never argued that Feick Security Systems is not an employer within the meaning of section 902(4) of the Act. To qualify as an employer it is necessary only that an employer have one employee engaged in maritime employment. See *Flowers v. Travelers Insurance Company,* 258 F. 2d 220 (5th Cir. 1958). Therefore, since Santo was engaged in maritime employment at the

amendment case law is still apposite.[10]

The jurisdictional "hiatus" conjured up by petitioner appears to be imaginary.[11] It is Santo who here urges a return to the uncertainty of past theories re-

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time of his accident, he qualifies both himself and his employer for coverage. By adding the new status requirement in §902(3) Congress has made the original requirement in §902(4) redundant; if the claimant/employee meets the status requirement, his employer automatically qualifies.

[10]See *Stewart v. Brown and Root, Inc.*, 7BRBS 356(1978).

> . . . it must be noted that the new [status] test is based on the meaning of "maritime employment", a term which has existed in the statute from its inception. The term was originally part of the definition of "employer", and satisfaction of that definition was the source of substantial litigation on the issue of the jurisdiction of the Act. There is no evidence in the statute or the legislative history to indicate that Congress intended the term "maritime employment" to have a more restrictive meaning in the amended section on "employees" than it had in the unamended section on "employers". Hence, reference to prior judicial construction of the phrase is entirely appropriate in post-amendment cases. *Id.* at 360.

[11]Petitioner notes that her claim for benefits under the federal Act has not yet been adjudicated. She alleges the "probability" of a denial; the possibility of being left without legal recourse. Petitioner's Brief at 24. Since her claim is pending, petitioner has suffered no injury as a result of the State Court's action and is requesting merely an advisory opinion from this Court "on the breadth and width of the jurisdictional" provisions of the Act.

quiring case by case adjudication.[12] The facts in this case present no new substantial federal question but rather fit neatly into the accepted jurisdictional structure of the federal Act and this Court's most recent interpretations of the Act.

[12]*Davis v. Department of Labor and Industries*, 317 U.S. 249 (1942)

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Appendix

Following are Sections 2(3), 2(4), and 3(a) of the Longshoremen's and Harbor Workers' Compensation Act. 44 Stat. 1424, 1426, as amended in 1972, 86 Stat. 1251, 33 U.S.C. 902(3), 902(4), 903(a). The pre-1972 language which the amendments eliminated is enclosed in black brackets; the new language which the amendments added is printed in italics; and the pre-1972 language which the amendments left unchanged is printed in roman.

DEFINITIONS

Sec. 2. When used in this Act —

(3) The term "employee" *means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker, but such term* does not include a master or member of crew of any vessel, [nor] *or* any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States [(including any dry docks)] *(including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).*

COVERAGE

Sec. 3(a) Compensation shall be payable under this Act in respect of disability of death of an employee, but only if the disability or death result from an injury occurring upon the navigable water of the United States [(including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law] *(including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).* No compensation shall be payable in respect of the disability or death of —

(1) A master or member of a crew of any vessel, [nor] *or* person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that three true copies of the foregoing Respondent Zurich Insurance Company's Brief in Opposition to Petition for Writ of Certiorari to the Florida Industrial Relations Commission, was mailed to GEORGE M. NACHWALTER, ESQ. of NACHWALTER, CHRISTIE & FALK, P.A., Attorneys for Petitioner, 9445 Bird Road, Miami, Florida 33165, to MRS. VERNA MARTIN, Clerk, INDUSTRIAL RELATIONS COMMISSION, 1321 Executive Center Drive, East, Tallahassee, Florida 32301 and EDWARD MOSS, ESQ., of BRUMER, MOSS, COHEN & RODGERS, Attorneys for FEICK SECURITY, 28 West Flagler Street, Miami, Florida this _____day of April, 1978.

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